# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1976

NO. 76-132

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD. IN BANKRUPTCY PROCEEDINGS, *Petitioner*,

vs.

CLARK-SCHWEBEL FIBERGLASS CORPORATION and BURLINGTON INDUSTRIES, INC., *Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## PETITIONER'S REPLY BRIEF

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## PETITIONER'S REPLY BRIEF

### SIMPLIFIED STATEMENT OF THE ULTIMATE PROBLEM INVOLVED

Petitioner stated the Questions Presented for review with an attempted nice regard for each of the legal principles which calls for condemnation of the departure by the Court of Appeals from our historic limitations on appellate procedure.

This resulted in six Questions Presented.

While respondents' motives for condensation are psychologically understandable, petitioner adheres to his formulation which invites attention to all of the legal predicates for exercise of this Court's power of supervision. But the ultimate, underlying problem may be more briefly stated:

> Will our appellate courts resume their historic, Common Law role of deciding questions of law and general matters of judicial administration? Or will they continue their disastrous plunge into the trial arena, becoming little more than surrogate jurors, administrative agencies, legislative committees, referees, and Boards of County Commissioners, performing inexpertly (because they are situated to deal only with paper records and not living realities) the functions intended for and better performed by others?[1]

## RESPONDENTS' CASES DO NOT MEET PETITIONER'S THRUST

***Neely v. Eby Construction Co.***, 386 U.S. 317 (1967), heavily relied on by both respondents (Clark-Schwebel brief, pp. 2, 12; Burlington brief, p. 24), could be of comfort to them only on the basis of superficial analysis. That case, concerned essentially with the mechanics of the then newly-amended and supplemented FRCP 50, must be read against the background of this Court's historic delineation of Seventh Amendment restrictions on appellate review of jury verdicts, in such cases as ***Slocum v. New York Life Ins. Co.***, 228 U.S. 364 (1913), ***Baltimore & Caroline Line v. Redman***, 295 U.S. 654 (1935) and ***Johnson v. New York, N.H. & H. Railroad Co.***, 344 U.S. 48 (1952).

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[1] Although seemingly of minor significance, petitioner regrets the error of assigning John Wilson to Burlington rather than Stevens. See Petition p. 12; Clark-Schwebel brief, p. 17; Burlington brief, p. 4.

This is not the time to enter into factual interpretations or to confront the misstatements in both of respondents' briefs.



In ***Neely***, the Court was careful to close its opinion by noting that "Petitioner's case in this Court is pitched on the total lack of power in the Court of Appeals to direct entry of judgment for respondent." (386 U.S. at 330). The instant petitioner's case is not so pitched. To the contrary, it is pitched not on lack of power but on the current need for refinement of restrictions on appellate interference with trial court autonomy, to the end that appellate power will remain operable and will not be so frequently and egregiously abused as it was below.

Factually, too, ***Neely*** and the instant case are worlds apart:

In ***Neely*** there is no indication that the trial judge did more than deny the j.n.o.v. motion. Here, he affirmatively, explicitly and strongly approved the jury's **special** and **detailed** verdict.[2]

## WHY FACTUAL ISSUES ARE FOR TRIAL COURTS

The words of Mr. Justice Black in ***Neely***, in the light of today's appellate realities, assume a prophetic as well as historic significance. For in discussing the necessity of a new trial after a verdict is set aside, he had occasion sharply to expose why factual issues are for trial courts:

> It is a factual issue and that the trial court is the more appropriate tribunal to determine it has been almost universally accepted by both federal and state courts

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[2] Similarly, the other cases invoked along with *Neely*, *United States v. Generes*, 405 U.S. 93 (1972), *First Nat. Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968) and *New York, N.H. & H.R.R. Co. v. Henagan*, 364 U.S. 441 (1960), do not control.

*Generes* involved the legal distinction between "dominant motivation" and "significant motivation" for purposes of tax-law classification of a bad debt, the kind of legal question for the resolution of which appellate courts sit.

The *First Nat. Bank of Arizona* case, wherein summary judgment was involved, not jury trial, was one of ***agreement*** with the trial court by the Court of Appeals and this Court. In none of the cases involving appellate

throughout the years. There are many reasons for this.

Appellate tribunals are not equipped to try factual issues as trial courts are.

A trial judge who has heard the evidence in the original case has a vast store of information and knowledge about it that the appellate court cannot get from a cold printed record.

Thus, as we said in ***Cone***, the trial judge can base the broad discretion granted him in determining factual issues of a new trial on his own knowledge of the evidence and the issues "in a perspective peculiarly available to him alone." 330 U.S., at 216.

The special suitability of having a trial judge decide the issue of a new trial in cases like this is emphasized by a long and unbroken line of decisions of this court holding that the exercise of discretion by trial judges in granting or refusing new trials on factual grounds is practically unreviewable by appellate courts. * * * (386 U.S. at 337-38; Spacing supplied for emphasis).

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displacement of a jury verdict does it appear that the trial court had affirmatively, strongly and explicitly approved the verdict, as here.

Compare the action of the instant trial court:

"Plaintiff has clearly demonstrated in his brief in opposition to the motions that there was sufficient evidence to support the jury's findings of a conspiracy and the Court is in complete agreement with that conclusion.

"There was sufficient evidence from which the jury could have reasonably found that Burlington and Clark-Schwebel took similar actions to restrict the credit terms on which they previously sold fiber glass fabrics to Textura and to restrict the availability of marketable fiber glass fabrics to it, all at a time when these defendants were in constant communication with each other, and that they knew that their joint actions would drive Textura out of business." (App. B, p. 2)



## THE THREAT OF ONE JUDGE AND NO JUDGE APPELLATE DECISIONS

How can our Courts of Appeals, with today's burgeoning calendars, be expected, or permitted, essentially to try cases de novo (although on cold records), where transcripts of thousands of pages are more the rule than the exception?

They can't personally and satisfactorily perform such feats; and it is a flight from reality to indulge the assumption that they do.

No wonder that this unnatural overload of fact-finding is passed on to law clerks, who become virtual one-person, substitute, non-constitutional jurors. Our Common Law system is threatened with disintegration, or at best, transformation into something like the Civil Law pattern, without any of the advantages of the latter. This will produce more and more "one judge and no judge" appellate decisions as a matter of routine. Some of our appellate courts are now alarmingly close to this point, if indeed they have not already reached it. See the article of Mr. Justice Thompson of the California Court of Appeal, ***One Judge and No Judge Appellate Decisions***, 50 California State Bar Journal 416 (Nov./Dec. 1975).

## THE PROPOSED RULE WOULD AFFORD APPELLATE COURTS AND THE PUBLIC SUBSTANTIAL RELIEF

Petitioner's suggestion offers appellate courts some surcease from the rolling flood of fact-finding chores, with resulting increased opportunity better to perform their true appellate functions. It offers the public significant relief from such deplorable miscarriages of justice as occurred below.

### NOT A RADICAL INNOVATION

It is not a radical innovation. It is essentially a refinement of historic Seventh Amendment and other requirements of decent

appellate review, revitalized and particularized in the light of current exigencies, as pointed out in the petition for certiorari.

THIS COURT'S SEVERAL ALTERNATIVES

It would seem that this Court has several alternatives in expressing the rule through this case:

(1) It may limit it only to antitrust cases. Cf. ***United States v. Patten***, 226 U.S. 525, 544 (1913); ***Continental Ore Co. v. Union Carbide Corp.***, 370 U.S. 690, 699 (1962). If Courts of Appeals can continue arbitrarily to set aside special jury verdicts specifically approved by the trial judge on factual grounds alone (as in this case), the antitrust laws will soon become no more than hollow shells;

(2) It may limit it to cases that turn on design, motive and intent (as does this case). Cf. ***United States v. Yellow Cab Co.***, 338 U.S. 338, 341 (1949); or

(3) It may apply it to all appeals in an effort to return the appellate function to its proper historic, Common Law role of deciding questions of law and matters of judicial administration, as distinguished from finding the facts. See generally Wright, ***The Doubtful Omniscience of Appellate Courts***, 41 Minn. L. Rev. 751 (1957).



## CONCLUSION

The questions of public interest presented by this case are basic, broad, and highly important. They arise in an antitrust factual context that cries out for redress of injustice.

This petition for a Writ of Certiorari should be granted.

Dated September 20, 1976.

Respectfully submitted,

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